United Nations A/HRC/26/NGO/90

General Assembly

Distr.: General
6 June 2014

English only

Human Rights Council
Twenty-sixth session
Agenda item 4
Human rights situations that require the Council's attention

Written statement* submitted by the Foodfirst Information and Action Network (FIAN), a non-governmental organization on the roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.14-04445 (E)
1404445

Please recycle

FIAN International calls on the Human Rights Council to start working towards the adoption of a legally binding instrument on TNCs and human rights

FIAN International is a non-governmental human rights organization working for the right to adequate food in over 50 countries worldwide. FIAN supports, inter alia, the struggles of communities affected by violations of the right to adequate food, and monitors public policies related to the right to adequate food and nutrition in light of existing international human rights standards.

As part of the Treaty Alliance (www.treatymovement.com) - a global alliance of civil society organizations (CSOs), campaigns, networks and social movements - FIAN has been advocating for the adoption of a legally binding international instrument on human rights and transnational corporations (TNCs).

Through this statement, FIAN International highlights the reasons why such a binding instrument is needed, and calls on the Human Rights Council to take steps towards the creation of an Open-Ended Working Group, to draft a binding instrument on human rights and TNCs. Such an instrument would close the existing gaps in protection and overcome the weaknesses of the existing non-binding norms, which have not been effective in guaranteeing TNCs' accountability, and do not ensure effective remedies to the victims of violations in which TNCs are involved.

1. Background

The issue of the impact of TNCs' activities on human rights is an old one. The first attempts at regulation date back to the 1970s, when companies' direct and indirect implication in systematic human rights violations imposed the need for multilateral efforts towards ensuring corporate human rights accountability. Since then diverse symbolic non-binding instruments of regulation, from the ILO Tripartite Declaration of Principles concerning Multinational Companies and Social Policy in 1977, to the more recent UN Global Compact (2000) and UN Guiding Principles on Business and Human Rights (2011) have been adopted. These instruments have fallen short in guaranteeing the respect and protection of human rights, and remedy for those affected by human rights abuses in which TNCs are involved. Additionally, a large body of binding rules have been adopted in the frame of trade and investment, mainly serving to protect international investors, more than contr[illegible]ng their operations under the human rights frameworks. The imposition of corporate interests over human rights in different intergovernmental forums, including the World Bank and the WTO, has been frequently denounced by CSOs and social movements.

In this frame, the initiative for a legally binding instrument on TNCs and human rights was called by a number of CSOs at the first regional meeting of the UN Working Group on business and human rights (August 2013, Medellin - Colombia) and at the Peoples' Forum convened by ESCR-Net and Forum Asia (November 2013, Bangkok). In September 2013, during the 24th session of the Human Rights Council (HRC), Ecuador read a statement supported by 85 States and 200 CSOs calling the HRC to work towards a binding instrument for human rights and business.

2. The insufficiency of existing international standards in guaranteeing TNCs' accountability and effective remedies for victims of human rights violations

Ever since their compilation in 2008, FIAN – supported by a number of CSOs and social movements – has openly expressed the weaknesses of the UN Guiding principles on Business and Human Rights (UNGPs), as these do not represent an advance in the existing international standards in the field of TNCs and human rights.

First, human rights standards should not be negotiated with private actors working for profit or with other actors having conflicts of interests. Nonetheless, this has been the case of the UNGPs. This situation makes questionable the human rights accuracy of these principles.

Second, while voluntary in nature, the UNGPs understate international human rights law as well as the obligations of both States and TNCs. Indeed casework has shown that voluntary measures are insufficient to ensure accountability and access to justice for affected communities and individuals.

Third, the restriction of the mandate of the Working Group on business and human rights established by the HRC in 2011 to the dissemination and implementation of the UNGPs, does not provide it with real competences to ensure accountability of TNCs. Moreover, the establishing resolution contains ambiguous paragraphs with regard to the possibility for the Working Group to receive individual communications and to work on further development of existing standards. These unclear formulations allow divergent interpretation by stakeholders and thus maintain gaps in protection. In the praxis the Working Group has been hesitant to receive complaints on cases or to advance towards a binding instrument.

Finally, the focus on the implementation of the UNGPs though the adoption of National Action Plans (NAPs) fails to address some of the core issues, such as the systemic and trans-boundary nature, impact and reach of TNCs activities, and the extra-territorial obligations of the States.

3. The added value of a treaty on TNCs and human rights

In light of this, the creation of a legally binding international instrument on TNCs and human rights is essential to tackle the fundamental gaps outlined above. Such an instrument would represent a step forward with regard to the existing non-binding instruments, which have proved to be insufficient in ensuring effective human rights protection.

A legally binding treaty and the UNGPs are two different things. The UNGPs illustrate how corporations and States should respect, protect and fulfill human rights when they are willing to apply the principles. However, when they do not have the will to apply such principles, there is no way to make sure human rights are enforced. Given this, new binding instruments are required, which should ensure TNCs' accountability in any case of violations, independently of the TNCs or State's will.

The adoption of global binding standards negotiated and agreed on by States in a democratic debate, and not just developed by experts, will also help balance asymmetries in rights and obligations between States and companies. There is no reason why companies should get away with activities that, if carried out by States, would be considered breaches of the obligation to respect human rights. Moreover, binding standards coupled with the establishment of international monitoring and accountability mechanisms that take into account the trans-boundary nature of TNCs' activities, will ensure access to justice in both home and host States for victims of violations.

In addition, legally binding rules that apply the same standards and regulations everywhere will create a level playing field that will benefit both corporations willing to invest abroad and States willing to attract foreign investments.

Finally, a treaty would help to redress existing imbalances of power in the international system created by the rapid expansion of international trade and investment law, that by instruments such as bilateral investment treaties (BITs) gives investors the right to sue States before international panels and provides an architecture of impunity for companies.

4. Recommendations to the Human Rights Council

FIAN International therefore welcomes the initiative of Ecuador and South Africa towards the creation of a binding instrument on TNCs and human rights, expressed in Ecuador's statement during the 24th session of the Council; and calls on the Human Rights Council to support this initiative through the creation of an intergovernmental working group in charge of negotiating and drafting such an instrument that:

- Affirms the applicability of human rights obligations to the operations of TNCs;
- Requires State parties to monitor and regulate the operations of TNCs under their jurisdiction, including when acting outside their national territory;
- Requires State parties to provide access to an effective remedy by any State concerned, including access to justice for abuses committed extraterritorially;
- Provides for an international and accountability mechanism;
- Provides for protection of victims and human rights defenders that seek to prevent, expose or ensure accountability in cases of corporate abuses.